

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 99 OF 2019

THE REPUBLIC..... PROSECUTOR

VERSUS

CHRISTOPHER CHIGANGA @MDONO..... ACCUSED

JUDGMENT

Date of Last Order: 10.06.2022

Date of Judgment: 29.08.2022

M. MNYUKWA, J.

The accused person, one CHRISTOPHER CHIGANGA @MDONO stand charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 [RE: 2002] now [RE: 2022]. The Accused Person denied the charge hence the full trial which involved calling five (5) prosecution witnesses and one for the defence.

The prosecution alleged that CHRISTOPHER CHIGANGA @MDONO on the 27th day of March 2018 at Bukindo area within Ukerewe District in Mwanza Region, murdered one MAGRETH D/O MAXIMILIAN @MUSOMA.

During the trial, the prosecution side, that is the Republic was represented by Rehema Mbuya, Sabina Choghogwe, and Deogratious Rumanyika the learned State Attorneys while Mr. Steven Kaijage, a learned advocate represented CHRISTOPHER CHIGANGA @MDONO, the accused person.

The trial was conducted with the aid of three assessors namely; Kasim Athumani (56 yrs), Mariam Chandela (47yrs), and Martin Katingizu (56 yrs). I thank the counsels for their time and efforts in the finalization of this case and I extend my thanks to the lady and gentlemen assessors who sat with me and stated their opinion based on the facts of the case. In summing up, the Gentlemen and Lady Assessors, gave their opinion whereas, in their opinions, Kasim Athumani and Mariam Chendele opined to find the accused CHRISTOPHER CHIGANGA @MDONO guilty of murder as charged while Martin Katingizu, opined to find the accused not guilty of murder as charged.

The prosecution called a total of five witnesses, RESTITUTA MSOLOLO (PW1), SOSTENES LWITAKUBI (PW2), CLEOPHAS NICODEM TUNGARAZA (PW3), DEUSDEDIT MAKARIUS (PW4), G2476 D/CPL MRISHO (PW5). The prosecution also tendered exhibits which are the post-mortem report (Exhibit P1) and the sketch map (Exhibit P2).

RESTITUTA MSOLOLO (PW1) testified that, on 27.03.2018 around 20:00 hours at night, when she was coming from the market going to her home Bukindo she heard a woman shout from the bush saying "*Chiganga umeniua*". She went ahead and by the aid of the moonlight which was very bright she saw Chiganga laying on the deceased MAGRETH D/O MAXIMILIAN @MUSOMA and PW1 asked Chiganga what he was doing.

She went on that, the accused escaped and she found that the deceased was cut by a machete on her legs. She went on that, she raised an alarm "Mwano" for help and people came and they found a machete with blood. At that time, MAGRETH D/O MAXIMILIAN @MUSOMA was just saying "Chiganga ameniua" and on the arrival of the deceased's husband, they sent MAGRETH D/O MAXIMILIAN @MUSOMA to Bomani Hospital and she passed away three hours later.

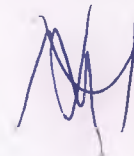
PW1 went on testifying that, she knew the deceased because she was her neighbour and her name was MAGRETH D/O MAXIMILIAN @MUSOMA who was married to Cleophas. She testified to knew the accused because he was often visiting their area Bukindo and at that night she identified the accused who was wearing a "*singland*" made with the material of *Kigunia*. When PW1 was cross-examined, she maintained that



she identified the accused person by the aid of the moonlight which was bright.

SOSTENES LWITAKUBI (PW2) testified that on 27/3/2018 at night around 20.00 hours while at his home watching News, he received a call from Msilanga Mayega that there was a killing of MAGRETH D/O MAXIMILIAN @MUSOMA who was cut by machete. When he got outside, he heard *mwano*, and went to the *mwano*. When he was on the way to the scene of the crime, he met with the accused and he asked why he was not going to the *mwano* but the accused did not reply and kept on walking at a speed. PW2 testified that, he identified the accused because there was moonlight and the accused was wearing "*balakhashia*" and other normal clothes and the accused used to come to Bukindo to drink beer and he knows him for more than 15 or 20 years.

PW2 testified that, before operation *Kijiji* they were living together at Nakisilila and after operation *kijiji* the accused who was involved in fishing and farming activities shifted to another village. PW2 went on that, when he reached the scene of crime, he found the deceased and PW1 whereby the deceased told him that the accused cut her with a machete. PW2 went on to testify that, PW1 told him that when she was there, she found the accused but he ran away. He went on to testify that, the



deceased was taken to the hospital and people who went to the scene of crime after the alarm that is *wananzengo*, went on searching for the accused.

PW2 went on testifying that, they found a machete with blood where the offence was committed and they managed to discover it for the climatic condition was dry, and the light was very brighter which was generated from full moon *mduara mkubwa*. PW2 went on that, around 22.00 hrs, they receive the news about the death of the deceased and he was appointed to accompany the deceased's husband to report the matter to the police. They reached to the police and gave out their statements concerned with the death of Magreth and they went back and arrested the accused in his residence and hand him over to the police station together with the machete.

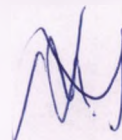
When cross-examined, PW2 maintained that he saw the accused who was in hurry and was able to see that he wore a *baraghashia* on his head and did not recognize the colours of his clothes. He testified that, they did not go to accused home on the fateful day which is approximately 2 kilometers from the scene of crime.

CLEOPHAS NICODEM TUNGARAZA (PW3) testified that on 27.03. 2018 at around 20.00 hrs, he received information that his wife, the

deceased was wounded and he went to the scene of crime where he met with PW1 and PW2. He was told by the deceased that, it was the accused who cut her and took her to Nansio police station where they were given a PF3 and sent her to hospital where she later died. PW3 went on that, they reported the matter to the police that the patient died, and they were requested to arrest the accused whereas, on 28.03.2018 around 11.30am, PW3 went with Sostenes and the chairman of the small village and arrest the accused at his residence and handed him over to the police station.

When cross-examined, he maintained that when he reached to the scene of crime, he met with other people and he found blood on the area and he knew Chiganga, the accused before the incident. He also avers that at the scene of crime, they recovered the machete with blood and it was sent to the police station. He also claimed that, the deceased who regained consciousness at around 23:00 hrs told him that it was Chiganga, the accused who cut her.

DEUSDEDIT MAKARIUS (PW4) a retired medical doctor testified that on 28.03.2018, while he was on his duty station at Nansio hospital, he examined the body of the deceased to whom he was informed that it was the body of MAGRETH D/O MAXIMILIAN @MUSOMA. After investigation, he found the deceased had suffered excessive loss of blood due to a deep



cut by a sharp object. PW4 went on that, he filed a post-mortem report and handled it over to the police station. He identified the report and prays to tender it as an exhibit. The exhibit was admitted as exhibit P1.

G2476 D/CPL MRISHO (PW5) testified that he is a police officer who works at Nansio Police station. On 27.03.2018, he went to the scene of crime as head of the investigation unit. PW5 testified to have interviewed witnesses and drawn a sketch map assisted by Restituta Msololo. PW5 identified the sketch map before the court and prays to tender it as an exhibit and the same was duly admitted as exhibit P2. PW5 went on that, he investigated the case and wrote statements of different witnesses including that of Modesta Maximilian who is the relative of the deceased and she was with the deceased before her death.

When cross-examined, PW5 avers that the machete was handed over to the police station and he did not know if the accused person and the deceased are related.

The prosecution did not have another witness, therefore, prayed to close the case on their side. After the prosecution case was marked closed this Court ruled that the accused persons CHRISTOPHER S/O CHIGANGA @MDONO, in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 R. E. 2022], has a case to answer and was addressed in terms

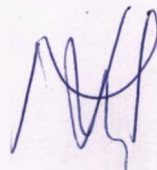
of section 293(2)(a) and (b), (3) and (4) of the Criminal Procedure Act, Cap 20 R.E 2022 whereas the accused chose to defend on oath without calling witnesses.

On his part, the accused person CHRISTOPHER S/O CHIGANGA @MDONO (DW1), 46 years old, a fisher and resident of Kagunguli village in Ukerewe testified that on 27.03.2018 at around 17:00 he was at the house of Msena, Bukindo drinking beer and at around 21:00hrs he left to his fish trap *Mwalo* and later on went back to his home around 23:00hrs. DW1 went on that, the next day the chairman came with three other persons and told him that they wanted to have their carpentry work worked out. DW1 took a feet measure and sell some of the fish to the chairman who left and he joined the three persons and they stopped near the police station. After a while, the two other persons came with two policemen and introduced them that *ni huyu hapa*. He was arrested and accused of murder of the deceased while he was not aware. DW1 denied to have killed the deceased and prayed this court to set him free.

When he was cross-examined, he maintained that while at the police station he denied to have committed the offence insisting that his work was fishing and carpentry and he never confessed to have committed the offence.

After the testimonies from both the prosecution and defence, PW4 evidence and exhibit P1 which is the post-mortem report proved that the death of the deceased person namely MAGRETH D/O MAXIMILIAN@MUSOMA, which was not disputed by either party, was unnatural. I am now tasked to determine who caused the death of MAGRETH D/O MAXIMILIAN @MUSOMA. In the process, I need to address my mind to the predominant legal principles which cover both aspects of criminal law as well as the law of evidence to ensure that no innocent person is convicted of flimsy evidence. The prosecution side as required by law, needs to prove the case against the accused person and the standard as stated under section 3(2)(a) of the Law of Evidence, Act Cap 6 RE 2002 (now RE 2022) is beyond reasonable doubts. The court of Appeal of Tanzania put it clear in the case of **Mohamed Haruna @ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) that: -

"...in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."



Therefore, the accused is not placed with a duty to prove his innocence as reflected for under Section 110 and Section 112 of the Evidence Act, Cap 6 [RE: 2002], now [RE: 2022]. See also the principle underlined in the case of **Joseph John Makune v R** [1986] TLR 44 where the Court of Appeal held that:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."

The accused person CHRISTOPHER CHIGANGA@ MDONO who stands his trial before this court is accused of MURDER which our penal laws mandatorily directed the capital punishment when the accused is found guilty. In the process, it is the requirement of law that the prosecution must prove the act of killing and connect the act of killing with evil intention of the dourer (malice aforethought). The law is settled under Section 196 of the Penal Code, Cap. 16 [RE: 2019] which provides that: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".

After the testimonies by both parties, as I hinted above, no doubt that MAGRETH D/O MAXIMILIAN @MUSOMA is now the deceased and the evidence of PW4 and Exhibit P1 proved that the death was unnatural as the cause of death was due to multiple cuts wounds inflicted on her body which caused severe bleeding that resulted to her death (exhibit P1). Mercilessly, the multiple-cut wounds were brutally inflicted by using a heavy and sharp object. Therefore, the assailants did it with malice aforethought and there is no disagreement that the assailant contemplated and intend to kill. To that point, it is my findings that whoever inflicted the wounds did it with malice aforethought in terms of Section 200 of the Penal Code, Cap. 16[RE: 2002] now [RE: 2019].

Tasking now is to weigh whether the prosecution managed to prove to the standard required that it was the accused person CHRISTOPHER CHIGANGA@ MDONO who killed MAGRETH D/O MAXIMILIAN @MUSOMA, the deceased.

First, PW1 testified to have witnessed the crime and identified the accused person as the assailant who committed the crime. Before going to details, and taking on account of the time when the crime was committed, which is stated to be at around 20:00 hrs, and without fail to recall that, PW1 testified to have witnessed the accused committing



murder, it is imperative that, with all other evidence, I have a testimony of the eye witness.

PW1 testified on oath that she witnessed the accused person committing the offence aided by the moon light and the accused managed to run where PW1 among other things, she was able to identify the clothes that the accused was wearing as she identified them as *a singlend* made of *kigunia cheupe* and a *baragashia* on his head. To retell it alongside, PW2 who heard the alarm, *Mwano* on his way to the crime scene, he testified to have met the accused who was in hurry and also identified him that he wore normal clothes and *baraghashia*.

From the testimony of PW1 and PW2, I will start with the issue of Identification and therefore, I will start to determine whether the identification was proper, in line with whether the identification of the accused left no doubt or whether there was no mistake of identity.

Undeniably, the law of visual identification has been discussed in the plethora of decisions both of this court and the Court of Appeal and laid the guidelines. Among of the important decision is that of **Waziri Amani v. Republic** [1980] TLR 250, where the Court cautioned, at pages 251 to 252, that: -



"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows, therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight

Then, the Court stated, at p. 252, that:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried, I would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."



(See also the case of **Yusuph Sayi & 2 Others vs R**, Criminal Appeal No. 589 of 2017 and **Mabula Makoye & Another vs Republic**, Criminal Appeal No. 227 of 2017).

From the above authority, I will examine the evidence of PW1 to find whether there was a proper identification. First, it is undisputed that the offence was committed around 20:00 hrs and the evidence of PW1 consistently maintained that she managed to identify the accused by the aid the of the moonlight which was full and bright.

I am aware with the principle that, when dealing with the evidence of eye witness, the important point is as to the credibility of the witness for, eye witness testimony can be a very powerful tool in determining a person's guilt or innocence, but it can also be devastating when false witness identification is made due to honest confusion or outright lying. In **Jaribu Abdalah v Republic** [2003] TLR 271, CAT, quoted with authority in the case of **Mawazo Mohamed Nyoni @Pengo & 2 Others vs Republic**, Criminal Appeal No. 184 of 2018 it was held that: -

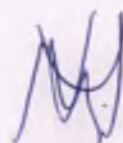
"a matter of identification is not enough merely to look at factor favouring accurate identification equally important is the credibility of the witness, the ability of the witness to name the offender at the earliest possible moment is reassuring though not a decisive factor"



There is no doubt that moonlight can facilitate a positive identification for the court to rely on the conviction of the accused person. The court of appeal in **Hamimu Hamisi Totoro Zungu Pablo & Two Others vs. The Republic**, Criminal Appeal No. 170 of 2004 (unreported), where the court had an occasion to deal with visual identification evidence that was alleged to have been facilitated by moonlight, the Court of Appeal cautioned when it stated that: -


"...Admittedly, moonlight is a weak source of light and is not as strong a light as sunshine or powerful electric light. However, under certain circumstances, such as proximity and familiarity to the assailant, moonlight can enable the victim to sufficiently recognize his or her assailant."

The Court of Appeal reiterated the principle in the case of **Juma Dimbwe Magari vs Republic**, Criminal Appeal No. 352 of 2014 stated that the moonlight is a weak source for purposes of positive identification. The Court of Appeal emphasized the need for the identifying witness to also disclose such surrounding factors as the proximity, familiarity to the assailant in terms of appearance, living in the same locality, being a family member, in names, walks. The Court of Appeal insisted that it is after taking into account the source of light and other related factors can it be said that the moonlight facilitated the positive visual identification.



Subjecting the principle to the evidence at hand, first, PW1 evidence was to the extent that he saw the assailant whom she identified with the aid of the moonlight which she described that the light was bright, she stood very close to the assailant who ran away and PW1 knew the accused because he was often visiting their area Bukindo and that night she identified the accused because he was wearing a "*singland ya kigunia cheupe*". PW1 managed to expressly explain to the favorable conditions that favored her identification.

Before I can rule out that indeed the accused was properly identified, I recall the evidence of PW2 who also testified to meet the accused while heading to the scene of crime in response to the alarm and the accused was in hurry and PW2 managed to identify the accused who wore the normal clothes and a *baraghashia*. I find that, there are two versions which are identical on the identification of the culprit from the evidence of PW1 and that of PW2. While PW1 was able to identify the accused that he wore a *singland made of kigunia cheupe and balaghashia* PW2 saw the accused wearing normal clothes and a *barghashia* when he met him on way in hurry. Even if the two versions of the testimony seem to be somehow different as to the *singland* alleged to be wore by the accused as stated by PW1 which was not stated by PW2. However, going



through the evidence of PW2, he stated that they found the *singland* in the following morning in the scene of crime. This evidence suggests that the *singland* wore out that's why he was found in the normal clothes. For the reasons I find that, both PW1 and PW2 who used the same source of light in the identification of the accused person identified him. The outlook of the accused person was described by PW2 when he was cross examined in which he testified that: -

"...on the following day we found "kigunia" which was in the form of "Singland" We didn't take "Kigunia" which was in the style of "singland" though we have seen it in the scene".

The above expert is a positive corroboration of PW1 evidence that the assailant left the clue on the scene of crime since PW2 who went to the scene the morning of the incident pointed out to find the *singland* in the scene of crime in which PW1 identified the accused to have wore a *singland* on the material day. Thus, their evidence implicating the accused person. In that regard, I find that the evidence of PW1 and PW2 to be credible to prove beyond reasonable doubts that, there was a positive identification of the accused and therefore I will rely on it to prove the case against the accused.

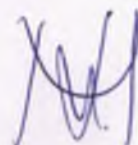
In support of identification, the said late MAGRETH D/O MAXIMILIAN @MUSOMA mentioned the accused at the very earliest opportunity as it

is reflected in the evidence of PW1 who is also an eye witness, PW2 who met the accused on the way when he was going to the scene of crime and PW3 who was the deceased's husband.

It is trite law that, early naming of a suspect makes assurance on the identification and reliability higher as it was held in the case of **Marwa Wangai and Another vs Republic**, [2002] TLR 39.

Again, the evidence of PW1, PW2 and PW3 introduced the evidence of dying declaration that the deceased named the accused before her death. Under section 34B of the Evidence Act, Cap.6 [RE: 2019], a statement made by a deceased person relating to her cause of death is admissible in evidence. The admissibility of statements under section 34B (2) of the Evidence Act, Cap. 6 [RE: 2022] was discussed at length in the case of **Elias Melani Kivunyo v Republic**, Criminal Appeal No. 40 of 2014 (unreported). The dying declaration in question is oral dying declaration whereas PW1, PW2 and PW3 among other, testified that the deceased mentioned the accused to have assaulted her.

Before I could rule out that a dying declaration can be relied upon by this court, I subjected the same to several tests to find out whether: such declaration was made by the deceased, whether the deceased was



able to identify the accused in exclusion of any other person, and whether there is another evidence on record to corroborate the same.

On the first point, PW1, PW2 and PW3 testified that, the deceased mentioned the accused to be the one who assaulted her. While PW1 and PW2 testified that they were told on the scene of crime, PW3 testimony was to the extent that the deceased who was his wife told him at around 23:00hrs while on hospital after she regained consciousness. From the testimonies of the PW1, PW2 and PW3, both claimed that the words were uttered by the deceased. Before I subject the same to test, I find it imperative to determine the second point as to whether the deceased was on position to make a positive identification of the accused person.

I am fully aware that a dying declaration falls under the category of evidence in which material corroboration is necessary before it can be accepted and relied upon as it was observed in the case of **Crosperry Ntagalinda @ Koro v Republic**, Criminal Appeal No. 312 of 2015 (unreported), and the case of The **Republic v Joseph Ngaikwamo** [1977] LRT No. 6. Therefore, the evidence of PW1 and PW2 whereas this court ruled out earlier that they did positively identify the accused, the same is my findings that there is enough evidence that the deceased positively identified the accused. In that point therefore, the evidence of



PW1, PW2 and PW3 was very strong and a material corroboration for this court to rely upon it in convicting the accused. Guided by the above cited authority, I hold that in the instant case the evidence of dying declaration can be relied upon to prove the prosecution case against the accused person.

Thus, I am satisfied that the prosecution's evidence is credible and reliable. I do not think that the positive evidence of the prosecution witnesses is shakeable. I am in accord with two assessors that the prosecution has proved their case beyond reasonable doubt against the accused, CHRISTOPHER S/O CHIGANGA@MDONO. In the event, I find that the accused is guilty as charged. I, therefore, convict him for murder contrary to section 196 of the Penal Code Cap. 16 [RE: 2019]

DATED at **MWANZA** this 29th August 2022.



M.MNYUKWA


JUDGE

29/08/2022

SENTENCE

Since CHRISTOPHER S/O CHIGANGA@MDONO, the accused has been convicted of murder, I hereby sentence him to death by hanging in terms of section 197 of the Penal Code, Cap 16 R.E 2002 now R.E 2022.




M.MNYUKWA

JUDGE

29/08/2022

Court: The right to appeal against this Judgement is fully explained and guaranteed.


M.MNYUKWA

JUDGE

29/08/2022